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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
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11 BEN EDIOR, ) No. EDCV 08-1697-RC  
12 Plaintiff, )  
13 v. ) OPINION AND ORDER  
14 MICHAEL J. ASTRUE, )  
15 Commissioner of Social Security, )  
16 Defendant. )  
17

18 Plaintiff Ben Edior filed a complaint on December 3, 2008,  
19 seeking review of the Commissioner's decision denying his application  
20 for disability benefits. On June 1, 2009, the Commissioner answered  
21 the complaint, and the parties filed a joint stipulation on July 15,  
22 2009.  
23

24 **BACKGROUND**

25 On March 31, 2006 (protective filing date), plaintiff, who was  
26 born on July 11, 1981, applied for disability benefits under the  
27 Supplemental Security Income program ("SSI") of Title XVI of the  
28 Social Security Act ("Act"), claiming an inability to work since

1 October 1, 2002, due to sickle cell disease, nephrotic syndrome,  
2 arthritis and gout. Certified Administrative Record ("A.R.") 9, 89-  
3 92, 101. The plaintiff's application was initially denied on May 31,  
4 2006, and was denied again on April 3, 2007, following  
5 reconsideration. A.R. 48-52, 55-66. The plaintiff then requested an  
6 administrative hearing, which was held before Administrative Law Judge  
7 Thomas P. Tielens ("the ALJ") on April 28, 2008. A.R. 16-45, 63. On  
8 June 23, 2008, the ALJ issued a decision finding plaintiff is not  
9 disabled. A.R. 6-15. The plaintiff appealed this decision to the  
10 Appeals Council, which denied review on September 26, 2008. A.R. 1-5.

## 11 12 DISCUSSION

### 13 I

14 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
15 review the Commissioner's decision denying plaintiff disability  
16 benefits to determine if his findings are supported by substantial  
17 evidence and whether the Commissioner used the proper legal standards  
18 in reaching his decision. Vasquez v. Astrue, 572 F.3d 586, 591 (9th  
19 Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009).  
20 "In determining whether the Commissioner's findings are supported by  
21 substantial evidence, [this Court] must review the administrative  
22 record as a whole, weighing both the evidence that supports and the  
23 evidence that detracts from the Commissioner's conclusion." Reddick  
24 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Holohan v. Massanari,  
25 246 F.3d 1195, 1201 (9th Cir. 2001). "Where the evidence can  
26 reasonably support either affirming or reversing the decision, [this  
27 Court] may not substitute [its] judgment for that of the  
28 Commissioner." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007),

1 cert. denied, 128 S. Ct. 1068 (2008); Vasquez, 572 F.3d at 591.

2  
3 The claimant is "disabled" for the purpose of receiving benefits  
4 under the Act if he is unable to engage in any substantial gainful  
5 activity due to an impairment which has lasted, or is expected to  
6 last, for a continuous period of at least twelve months. 42 U.S.C.  
7 § 1382c(a)(3)(A); 20 C.F.R. § 416.905(a). "The claimant bears the  
8 burden of establishing a prima facie case of disability." Roberts v.  
9 Shalala, 66 F.3d 179, 182 (9th Cir. 1995), cert. denied, 517 U.S. 1122  
10 (1996); Smolen v. Chater, 80 F.3d 1273, 1289 (9th Cir. 1996).

11  
12 The Commissioner has promulgated regulations establishing a five-  
13 step sequential evaluation process for the ALJ to follow in a  
14 disability case. 20 C.F.R. § 416.920. In the **First Step**, the ALJ  
15 must determine whether the claimant is currently engaged in  
16 substantial gainful activity. 20 C.F.R. § 416.920(b). If not, in the  
17 **Second Step**, the ALJ must determine whether the claimant has a severe  
18 impairment or combination of impairments significantly limiting him  
19 from performing basic work activities. 20 C.F.R. § 416.920(c). If  
20 so, in the **Third Step**, the ALJ must determine whether the claimant has  
21 an impairment or combination of impairments that meets or equals the  
22 requirements of the Listing of Impairments ("Listing"), 20 C.F.R.  
23 § 404, Subpart P, App. 1. 20 C.F.R. § 416.920(d). If not, in the  
24 **Fourth Step**, the ALJ must determine whether the claimant has  
25 sufficient residual functional capacity despite the impairment or  
26 various limitations to perform his past work. 20 C.F.R. § 416.920(f).  
27 If not, in **Step Five**, the burden shifts to the Commissioner to show  
28 the claimant can perform other work that exists in significant numbers

1 in the national economy. 20 C.F.R. § 416.920(g). Moreover, where  
2 there is evidence of a mental impairment that may prevent a claimant  
3 from working, the Commissioner has supplemented the five-step  
4 sequential evaluation process with additional regulations addressing  
5 mental impairments.<sup>1</sup> Maier v. Comm'r of the Soc. Sec. Admin., 154  
6 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).

7  
8 Applying the five-step sequential evaluation process, the ALJ  
9 found plaintiff has not engaged in substantial gainful activity since  
10 March 31, 2006, his application date. (Step One). The ALJ then found  
11 plaintiff has the severe impairments of sickle cell disease and  
12 nephrotic syndrome; however, he also has mild depression, which is not  
13 a severe impairment. (Step Two). The ALJ also found plaintiff does  
14 not have an impairment or combination of impairments that meets or  
15 equals a Listing. (Step Three). Next, the ALJ determined plaintiff  
16 has no past relevant work. (Step Four). Finally, the ALJ found

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17  
18 <sup>1</sup> First, the ALJ must determine the presence or absence of  
19 certain medical findings relevant to the ability to work. 20  
20 C.F.R. § 416.920a(b)(1). Second, when the claimant establishes  
21 these medical findings, the ALJ must rate the degree of  
22 functional loss resulting from the impairment by considering four  
23 areas of function: (a) activities of daily living; (b) social  
24 functioning; (c) concentration, persistence, or pace; and (d)  
25 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4).  
26 Third, after rating the degree of loss, the ALJ must determine  
27 whether the claimant has a severe mental impairment. 20 C.F.R.  
28 § 416.920a(d). Fourth, when a mental impairment is found to be  
severe, the ALJ must determine if it meets or equals a Listing.  
20 C.F.R. § 416.920a(d)(2). Finally, if a Listing is not met,  
the ALJ must then perform a residual functional capacity  
assessment, and the ALJ's decision "must incorporate the  
pertinent findings and conclusions" regarding the claimant's  
mental impairment, including "a specific finding as to the degree  
of limitation in each of the functional areas described in  
[§ 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

1 plaintiff can perform a significant number of jobs in the national  
2 economy; therefore, he is not disabled. (Step Five).

## 3 4 II

5 The Step Two inquiry is "a de minimis screening device to dispose  
6 of groundless claims." Smolen, 80 F.3d at 1290; Webb v. Barnhart, 433  
7 F.3d 683, 687 (9th Cir. 2005). The Supreme Court has recognized that  
8 including a severity requirement at Step Two of the sequential  
9 evaluation process "increases the efficiency and reliability of the  
10 evaluation process by identifying at an early stage those claimants  
11 whose medical impairments are so slight that it is unlikely they would  
12 be found to be disabled even if their age, education, and experience  
13 were taken into account." Bowen v. Yuckert, 482 U.S. 137, 153, 107  
14 S. Ct. 2287, 2297, 96 L. Ed. 2d 119 (1987). However, an overly  
15 stringent application of the severity requirement violates the Social  
16 Security Act by denying benefits to claimants who do meet the  
17 statutory definition of disabled. Corrao v. Shalala, 20 F.3d 943, 949  
18 (9th Cir. 1994).

19  
20 A severe impairment or combination of impairments within the  
21 meaning of Step Two exists when there is more than a minimal effect on  
22 an individual's ability to do basic work activities. Webb, 433 F.3d  
23 at 686; Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001); see  
24 also 20 C.F.R. § 416.921(a) ("An impairment or combination of  
25 impairments is not severe if it does not significantly limit [a  
26 person's] physical or mental ability to do basic work activities.").  
27 Basic work activities are "the abilities and aptitudes necessary to do  
28 most jobs," including physical functions such as walking, standing,

1 sitting, lifting, pushing, pulling, reaching, carrying or handling, as  
2 well as the capacity for seeing, hearing and speaking, understanding,  
3 carrying out, and remembering simple instructions, use of judgment,  
4 responding appropriately to supervision, co-workers and usual work  
5 situations, and dealing with changes in a routine work setting. 20  
6 C.F.R. § 416.921(b); Webb, 433 F.3d at 686.

7  
8 Although the ALJ found, in Step Two, that plaintiff has the  
9 severe impairments of sickle cell disease and nephrotic syndrome,  
10 plaintiff complains the ALJ erred in not finding his mental impairment  
11 and obesity are also severe impairments. There is no merit to this  
12 claim.

13  
14 **A. Mental Impairment:**

15 On March 20, 2007, Linda Smith, M.D., examined plaintiff and  
16 diagnosed him as having an unspecified depressive disorder and an  
17 unspecified anxiety disorder and determined plaintiff's Global  
18 Assessment of Functioning ("GAF") was 62.<sup>2</sup> A.R. 178-84. Dr. Smith  
19 found plaintiff "is mildly impaired." A.R. 183. More specifically,  
20 she found plaintiff "had a couple of problems with memory on the  
21 mental status exam," but not what she "would consider substantial  
22 problems." Id. Thus, Dr. Smith concluded plaintiff is not impaired  
23 in his ability to understand, remember, or complete simple commands,

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24  
25 <sup>2</sup> A GAF of 62 indicates "[s]ome mild symptoms (e.g.,  
26 depressed mood and mild insomnia) or some difficulty in social,  
27 occupational, or school functioning (e.g., occasional truancy, or  
28 theft within the household), but generally functioning pretty  
well, has some meaningful interpersonal relationships." American  
Psychiatric Association, Diagnostic and Statistical Manual of  
Mental Disorders, 34 (4th ed. (Text Revision) 2000).

1 but is "mildly" impaired in his ability to: understand, remember, or  
2 complete complex commands; interact appropriately with supervisors,  
3 co-workers, or the public; comply with job rules such as safety and  
4 attendance; respond to change in the normal workplace; and maintain  
5 persistence and pace in a normal workplace. A.R. 183-84. Apart from  
6 Dr. Smith, the only other physician to assess plaintiff's mental  
7 condition was a nonexamining psychiatrist, Herbert Hurwitz, M.D., who  
8 found plaintiff does not have a severe mental impairment. A.R. 202-  
9 12.

10  
11 Here, the ALJ concluded plaintiff does not have a severe mental  
12 impairment, A.R. 11, 13, and this finding does not contradict the  
13 opinion of Dr. Smith; rather, it is supported by the opinions of both  
14 Drs. Smith and Hurwitz. See, e.g., Tonapetyan v. Halter, 242 F.3d  
15 1144, 1149 (9th Cir. 2001) (examining physician's medical report based  
16 on independent examination of claimant constitutes substantial  
17 evidence to support ALJ's disability determination); Saelee v. Chater,  
18 94 F.3d 520, 522 (9th Cir. 1996) ("[T]he findings of a nontreating,  
19 nonexamining physician can amount to substantial evidence, so long as  
20 other evidence in the record supports those findings."), cert. denied,  
21 519 U.S. 1113 (1997).

22  
23 **B. Obesity:**

24 "Obesity is a complex, chronic disease characterized by excessive  
25 accumulations of body fat." Social Security Ruling ("SSR") 02-01p,  
26 2000 WL 62809, \*2 (S.S.A.). "Obesity is a medically determinable  
27 impairment that is often associated with disturbance of the  
28 musculoskeletal[, respiratory, and cardiovascular] system[s], and

1 disturbance of [these] system[s] can be a major cause of disability in  
 2 individuals with obesity." 20 C.F.R. § 404, Subpart P, App. 1,  
 3 Listing 1.00Q, 3.00I, and 4.00F. "Obesity may also cause or  
 4 contribute to mental impairments such as depression." SSR 02-01p,  
 5 2000 WL 62809 at \*3.

6  
 7 The Court finds Celaya v. Halter, 332 F.3d 1177, 1182 (9th Cir.  
 8 2003), wherein the Ninth Circuit held the ALJ committed legal error by  
 9 failing to consider the claimant's obesity, is inapposite here.  
 10 First, unlike Celaya, plaintiff was represented by counsel at his  
 11 administrative hearing, A.R. 16-48, and counsel had the opportunity to  
 12 raise the claim of plaintiff's purported obesity. Burch v. Barnhart,  
 13 400 F.3d 676, 682 (9th Cir. 2005). Second, also unlike Celaya,  
 14 plaintiff's purported obesity is in the most mild category since  
 15 plaintiff testified he is 5'4" tall and weighs 184 pounds, A.R. 40,  
 16 which equates to a Body Mass Index ("BMI") of 31.6.<sup>3</sup> Finally, the  
 17 record contains absolutely no evidence demonstrating plaintiff's

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18  
 19 <sup>3</sup> Under Social Security Ruling 02-01p,

20 overweight and obesity [are classified] in adults  
 21 according to Body Mass Index (BMI). BMI is the ratio  
 22 of an individual's weight in kilograms to the square of  
 23 his or her height in meters (kg/m<sup>2</sup>). For adults, both  
 24 men and women, the Clinical Guidelines describe a BMI  
 25 of 25-29.9 as "overweight" and a BMI of 30.0 or above  
 26 as "obesity." [¶] The Clinical Guidelines recognize  
 27 three levels of obesity. Level I includes BMIs of  
 28 30.0-34.9. Level II includes BMIs of 35.0-39.9. Level  
 III, termed "extreme" obesity and representing the  
 greatest risk for developing obesity-related  
 impairments, includes BMIs greater than or equal to 40.

Id. at \*2.

1 obesity exacerbates his other impairments, see SSR 02-1p, 2000 WL  
 2 628049 at \*4 ("There is no specific level of weight or BMI that  
 3 equates with a 'severe' or a not severe' impairment. Neither do  
 4 descriptive terms for levels of obesity (e.g., "severe," "extreme," or  
 5 "morbid" obesity) establish whether obesity is or is not a "severe"  
 6 impairment for disability program purposes."), or has any effect on  
 7 his ability to perform basic work activities. Verduzco v. Apfel, 188  
 8 F.3d 1087, 1089 (9th Cir. 1999); see also Burch, 400 F.3d at 683  
 9 ("Even on appeal, [plaintiff] has not pointed to any evidence of  
 10 functional limitations due to obesity which would have impacted the  
 11 ALJ's analysis."). Therefore, plaintiff has not shown the ALJ erred  
 12 in Step Two.

### 13 14 III

15 A claimant's residual functional capacity ("RFC") is what he can  
 16 still do despite his physical, mental, nonexertional, and other  
 17 limitations. Mayes, 276 F.3d at 460; see also Valentine v. Comm'r,  
 18 Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir. 2009) (RFC is "a summary  
 19 of what the claimant is capable of doing (for example, how much weight  
 20 he can lift)."). Here, the ALJ found plaintiff:

21  
 22 has the [RFC] to perform light work<sup>4</sup> . . . except he is  
 23

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24 <sup>4</sup> Under Social Security regulations, "[l]ight work involves  
 25 lifting no more than 20 pounds at a time with frequent lifting or  
 26 carrying of objects weighing up to 10 pounds. Even though the  
 27 weight lifted may be very little, a job is in this category when  
 28 it requires a good deal of walking or standing, or when it  
 involves sitting most of the time with some pushing and pulling  
 of arm or leg controls. To be considered capable of performing a  
 full or wide range of light work, [the claimant] must have the

1 limited to occasional climbing, balancing, stooping,  
 2 kneeling, crouching, and crawling; he is limited to no  
 3 climbing of ladders, ropes, or scaffolds; and he must avoid  
 4 exposure to cold, heat, wet, humidity, and hazards such as  
 5 heights and fast-moving machinery.

6  
 7 A.R. 11 (footnote added). However, plaintiff contends the ALJ's RFC  
 8 assessment is not supported by substantial evidence because the ALJ  
 9 failed to properly consider a referral made by treating physician  
 10 Daniel Wolfson, M.D., improperly found plaintiff was not a credible  
 11 witness, and erroneously failed to address the side effects of  
 12 plaintiff's medication. There is no merit to these claims.

13  
 14 **A. Treating Physician's Opinion:**

15 The medical opinions of treating physicians are entitled to  
 16 special weight because the treating physician "is employed to cure and  
 17 has a greater opportunity to know and observe the patient as an  
 18 individual." Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987);  
 19 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.  
 20 1999). Therefore, the ALJ must provide clear and convincing reasons  
 21 for rejecting the uncontroverted opinion of a treating physician, Ryan  
 22 v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008); Reddick,  
 23 157 F.3d at 725, and "[e]ven if [a] treating doctor's opinion is  
 24 contradicted by another doctor, the ALJ may not reject this opinion  
 25 without providing 'specific and legitimate reasons' supported by  
 26 substantial evidence in the record." Reddick, 157 F.3d at 725;

27 \_\_\_\_\_  
 28 ability to do substantially all of these activities." 20 C.F.R.  
 § 416.967(b).

1 Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008). However,  
2 in assessing a claimant's application for disability benefits, an ALJ  
3 need not set forth verbatim every statement a physician makes; rather,  
4 the ALJ need only discuss evidence that is significant and probative  
5 of a claimant's disability claim. Howard v. Barnhart, 341 F.3d 1006,  
6 1012 (9th Cir. 2003).

7  
8 On April 30, 2007, plaintiff's treating physician, Dr. Wolfsen,  
9 referred plaintiff for a pain management evaluation. A.R. 229.  
10 However, this referral does not offer an opinion as to plaintiff's  
11 impairments, limitations or prognosis; thus, its significance is  
12 unclear, and, standing alone, it does not contradict any finding made  
13 by the ALJ. Accordingly, the ALJ did not err in not discussing the  
14 referral.

15  
16 **B. Credibility:**

17 The plaintiff testified he cannot work because he experiences  
18 pain and swelling throughout his body, including in his neck, lower  
19 back, arms, hands, knees, ankles and stomach, his kidneys flare up,  
20 his joints stiffen, and he has urinated blood on a couple of  
21 occasions. A.R. 21-29. The plaintiff also stated his fingers  
22 sometimes swell so he cannot bend them, make a fist, or grab  
23 something, and if he does not use his hands they get stiff, but if he  
24 does use them he experiences shoulder and wrist pain. A.R. 24-25.  
25 Further, plaintiff testified he has migraine headaches every day or  
26 every other day, and sometimes his ankle pain is so bad he has to  
27 crawl. A.R. 25-26. He also stated he retains fluids and most of the  
28 time he swells "real bad where I can't walk [or] talk[,] his eyes get

1 puffy, his stomach gets "real big[,] and he cannot do anything. A.R.  
2 30. The plaintiff also complained he has a bad memory, A.R. 36, and  
3 testified he has been repeatedly hospitalized for various conditions.  
4 A.R. 20-21, 31. Finally, plaintiff estimated he can only sit for 20  
5 minutes, stand for 5 to 10 minutes, and walk about 50 yards at a slow  
6 pace because of his pain, and he has to lie down about 2-4 hours out  
7 of an 8-hour day, A.R. 38-40, and he usually cannot lift a full gallon  
8 of milk, cannot grip with his hands, and cannot drive because of his  
9 pain. A.R. 37-38.

10  
11 Once a claimant has presented objective evidence that he suffers  
12 from an impairment that could cause pain or other nonexertional  
13 limitations, the ALJ may not discredit the claimant's testimony  
14 "solely because the degree of pain alleged by the claimant is not  
15 supported by objective medical evidence." Bunnell v. Sullivan, 947  
16 F.2d 341, 347 (9th Cir. 1991) (en banc); Moisa v. Barnhart, 367 F.3d  
17 882, 885 (9th Cir. 2004). Thus, if the ALJ finds the claimant's  
18 subjective complaints are not credible, he "must provide specific,  
19 cogent reasons for the disbelief.'" Greger v. Barnhart, 464 F.3d 968,  
20 972 (9th Cir. 2006) (citations omitted); Orn v. Astrue, 495 F.3d 625,  
21 635 (9th Cir. 2007). Furthermore, if there is medical evidence  
22 establishing an objective basis for some degree of pain and related  
23 symptoms, and no evidence affirmatively suggesting the claimant is  
24 malingering, the ALJ's reasons for rejecting the claimant's testimony  
25 must be "clear and convincing." Morgan v. Comm'r of the Soc. Sec.  
26 Admin., 169 F.3d 595, 599 (9th Cir. 1999); Vasquez, 572 F.3d at 591  
27 (9th Cir. 2009).

28 //

1 In his decision, the ALJ concluded that plaintiff's "statements  
2 concerning the intensity, persistence and limiting effects of [his]  
3 symptoms are not credible[,] " in part, because they are inconsistent  
4 with the medical record. A.R. 13. For instance, although plaintiff  
5 testified he had been hospitalized in 2005 at the Arrowhead Regional  
6 Medical Center and Loma Linda University Medical Center, A.R. 103-04,  
7 and repeatedly hospitalized over the years, see also A.R. 169 (On  
8 March 7, 2007, plaintiff told examining physician "he has been in and  
9 out of the hospital frequently since a young age" and "was last  
10 hospitalized about six months ago at the Arrowhead Regional Medical  
11 Center"), there is absolutely nothing in the medical record showing  
12 such hospitalizations, see, e.g., A.R. 141-54, 163-68, and  
13 "[c]ontradiction with the medical record is a sufficient basis for  
14 rejecting the claimant's subjective testimony." Carmickle v. Comm'r,  
15 Soc. Sec. Admin., 533 F.3d 1155, 1161 (9th Cir. 2008); Bray v. Astrue,  
16 554 F.3d 1219, 1227 (9th Cir. 2009).

17  
18 The ALJ also based his adverse credibility determination of  
19 plaintiff on the sporadic nature of plaintiff's health care, which  
20 showed plaintiff "did not have a primary care physician for three  
21 years before establishing care at the Arrowhead Health Center in  
22 October 2005[,] " and plaintiff had no "recent treatment for any  
23 impairment." A.R. 13. Certainly, an "ALJ is permitted to consider  
24 lack of treatment in his credibility determination[,] " Burch, 400 F.3d  
25 at 681; see also Orn, 495 F.3d at 638 ("[I]f a claimant complains  
26 about disabling pain but fails to seek treatment . . . for the pain,  
27 an ALJ may use such failure as a basis for finding the complaint  
28 unjustified or exaggerated."). Thus, this finding also supports the

1 ALJ's adverse credibility determination.<sup>5</sup> See, e.g., Batson v. Comm'r  
 2 of the Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th Cir. 2004) (ALJ  
 3 properly rejected claimant's testimony based, in part, on fact that  
 4 claimant claimed he did not receive any medical treatment until almost  
 5 one year after alleged injury.).

6  
 7 Furthermore, in finding plaintiff was not credible, the ALJ also  
 8 found that there was "no treating source statement" regarding  
 9 plaintiff's RFC and no physician had determined plaintiff was  
 10 disabled, A.R. 13, and both of these findings support the ALJ's  
 11 adverse credibility determination. See, e.g., Matthews v. Shalala, 10  
 12 F.3d 678, 680 (9th Cir. 1995) (substantial evidence supported finding  
 13 claimant could do a narrow range of medium work where no examining  
 14 physician concluded claimant was totally disabled). For all these  
 15 reasons, "[t]he ALJ gave specific, clear and convincing reasons for  
 16 discounting [plaintiff's] testimony." Thomas, 278 F.3d at 959; Burch,  
 17 400 F.3d at 681.

### 18 19 **C. Side Effects:**

20 In determining a claimant's limitations, the ALJ must consider  
 21 all factors that might have a significant impact on an individual's  
 22 ability to work, including the side effects of medication. Erickson  
 23 v. Shalala, 9 F.3d 813, 817-18 (9th Cir. 1993); Varney v. Sec'y of  
 24 Health & Human Servs., 846 F.2d 581, 585 (9th Cir. 1988). Thus, when  
 25

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26  
 27 <sup>5</sup> Although plaintiff claims he didn't "have money or  
 28 insurance to see a doctor[,]" A.R. 35, this does not explain his  
 lack of medical care prior to October 2005, when he obtained such  
 care.

1 a claimant testifies he is experiencing a side effect known to be  
2 associated with a particular medication, the ALJ may disregard the  
3 testimony only if he "support[s] that decision with specific findings  
4 similar to those required for excess pain testimony, as long as the  
5 side effects are in fact associated with the claimant's medica-  
6 tion(s)." Varney, 846 F.2d at 585.

7  
8 Here, plaintiff testified at the administrative hearing that his  
9 medications sometimes make him tired, A.R. 32, and the ALJ rejected  
10 this testimony based on plaintiff's lack of credibility and to the  
11 extent it was inconsistent with the RFC determination. A.R. 13-14.  
12 The plaintiff's lack of credibility is a sufficient and proper reason  
13 for discrediting a claimant's testimony. See, e.g., Thomas, 278 F.3d  
14 at 960 (ALJ properly rejected claimant's claimed side effects,  
15 including dizziness and difficulties in concentration, based on a  
16 finding claimant lacked credibility). Moreover, since plaintiff did  
17 not report any alleged medication side effects to any physician, his  
18 claim is also not supported by the medical record. See, e.g., Greger,  
19 464 F.3d at 973 (ALJ did not err in assessing claimant's RFC when  
20 claimant did not report alleged side effect of fatigue to any  
21 physician); Miller v. Heckler, 770 F.2d 845, 849 (9th Cir. 1985) (The  
22 ALJ properly rejected claimant's claim that his use of prescription  
23 narcotics disabled him when claimant "produced no clinical evidence  
24 showing that narcotics use impaired his ability to work.").

#### 25 26 IV

27 At Step Five, the burden shifts to the Commissioner to show the  
28 claimant can perform other jobs that exist in the national economy.

1 Bray, 554 F.3d at 1222; Hoopai v. Astrue, 499 F.3d 1071, 1074-75 (9th  
 2 Cir. 2007). To meet this burden, the Commissioner "must 'identify  
 3 specific jobs existing in substantial numbers in the national economy  
 4 that [the] claimant can perform despite her identified limitations.'" Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (quoting Johnson,  
 5 60 F.3d at 1432). There are two ways for the Commissioner to meet  
 6 this burden: "(1) by the testimony of a vocational expert, or (2) by  
 7 reference to the Medical Vocational Guidelines ["Grids"] at 20 C.F.R.  
 8 pt. 404, subpt. P, app. 2."<sup>6</sup> Tackett v. Apfel, 180 F.3d 1094, 1099  
 9 (9th Cir. 1999); Bray, 554 F.3d at 1223 n.4. However, "[w]hen [the  
 10 Grids] do not adequately take into account [a] claimant's abilities  
 11 and limitations, the Grids are to be used only as a framework, and a  
 12 vocational expert must be consulted." Thomas, 278 F.3d at 960; Bray,  
 13 554 F.3d at 1223 n.4. Hypothetical questions posed to a vocational  
 14 expert must consider all of the claimant's limitations, Valentine, 574  
 15 F.3d at 690; Thomas, 278 F.3d at 956, and "[t]he ALJ's depiction of  
 16 the claimant's disability must be accurate, detailed, and supported by  
 17 the medical record." Tackett, 180 F.3d at 1101.

18  
 19  
 20 Here, the ALJ asked vocational expert Malcolm J. Brodzinsky the  
 21

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22 <sup>6</sup> The Grids are guidelines setting forth "the types and  
 23 number of jobs that exist in the national economy for different  
 24 kinds of claimants. Each rule defines a vocational profile and  
 25 determines whether sufficient work exists in the national  
 26 economy. These rules represent the [Commissioner's]  
 27 determination, arrived at by taking administrative notice of  
 28 relevant information, that a given number of unskilled jobs exist  
 in the national economy that can be performed by persons with  
 each level of residual functional capacity." Chavez v. Dep't of  
 Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996)  
 (citations omitted).

1 following hypothetical question:  
2

3 I'd ask you to consider that you're dealing with an  
4 individual the same as our claimant, who has the same  
5 educational background and past work experience. Assume for  
6 this hypothetical that this person could do light work, only  
7 occasionally climb, balance, stoop, kneel, crouch, or crawl;  
8 should use no ladders, ropes, or scaffolds; would need to  
9 avoid concentrated exposure to cold, heat, wet environments,  
10 humidity, and hazards such as heights and fast moving  
11 equipment. Is this hypothetical consistent with any work in  
12 the national or local economy?  
13

14 A.R. 43. The vocational expert responded that the individual could  
15 perform the full range of light assembly work, such as production  
16 assembler (Dictionary of Occupational Titles ("DOT")<sup>7</sup> no. 706.687.010)  
17 and cashier II (DOT no. 211.462-010). A.R. 43-44. However, plaintiff  
18 contends the hypothetical question to the vocational expert was  
19 incomplete because it did not include his testimony, his obesity, and  
20 the "mild" mental limitations found by Dr. Smith. There is no merit  
21 to plaintiff's claims.  
22

23 First, since the ALJ found plaintiff's testimony about his pain  
24 was not entirely credible, and that determination is supported by  
25 substantial evidence, as discussed above, the hypothetical question to  
26

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27 <sup>7</sup> The DOT is the Commissioner's primary source of reliable  
28 vocational information. Johnson, 60 F.3d at 1434 n.6; Terry v.  
Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990).

1 the vocational expert did not have to include plaintiff's testimony.  
2 See, e.g., Greger, 464 F.3d at 973 (9th Cir. 2006) ("The ALJ . . . 'is  
3 free to accept or reject restrictions in a hypothetical question that  
4 are not supported by substantial evidence.'" (quoting Osenbrock v.  
5 Apfel, 240 F.3d 1157, 1164-65 (9th Cir. 2001)); Copeland v. Bowen, 861  
6 F.2d 536, 540 (9th Cir. 1988) ("[E]xclusion of some of a claimant's  
7 subjective complaints in questions to a vocational expert is not  
8 improper if the ALJ makes specific findings justifying his decision  
9 not to believe the claimant's testimony about claimed impairments such  
10 as pain."). Similarly, since there is no evidence showing any  
11 functional limitations from plaintiff's obesity, also discussed above,  
12 the ALJ did not err in failing to include any obesity limitations in  
13 his hypothetical question to the vocational expert. Burch, 400 F.3d  
14 at 684. Finally, since Dr. Smith found plaintiff has only "mild"  
15 mental limitations, the ALJ's failure to include those limitations in  
16 the hypothetical question was harmless error since they have no effect  
17 on plaintiff's ability to work. See, e.g., Tommasetti, 533 F.3d at  
18 1038 ("The court will not reverse an ALJ's decision for harmless  
19 error, which exists when it is clear from the record that the ALJ's  
20 error was inconsequential to the ultimate nondisability  
21 determination." (citations and internal quotation marks omitted));  
22 Stroh v. Astrue, 2010 WL 572590, \*9 (D. Or.) ("[A]ny error arising  
23 from the ALJ's failure to incorporate the mild limitations in  
24 concentration, persistence, and pace into the [RFC] assessment was  
25 harmless. The ALJ provided sufficient reasons for concluding that  
26 [claimant's] mental impairment, from which these limitations arise, is  
27 not 'severe' within the meaning of relevant regulations. . . . Given  
28 that [claimant's] mental impairment was reasonably found to cause no

1 more than a minimal effect on her ability to work, the ALJ's failure  
2 to incorporate mild limitations in concentration, persistence, and  
3 pace into the residual functional capacity was harmless error."  
4 (citations omitted)).

6 **ORDER**

7 IT IS ORDERED that: (1) plaintiff's request for relief is denied;  
8 and (2) the Commissioner's decision is affirmed, and Judgment shall be  
9 entered in favor of defendant.

10  
11 DATE: March 5, 2010

/S/ ROSALYN M. CHAPMAN  
ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

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